

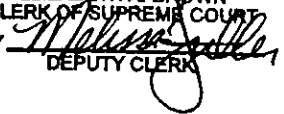
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD KISNER,
Appellant,
vs.
DR. DANA MARKS; C. MELL; BRIAN
EGERTON; AND NDOC,
Respondents.

No. 89469-COA

FILED

NOV 21 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART,
REVERSING IN PART AND REMANDING*

Richard Kisner appeals from a final district court order dismissing his complaint. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Kisner filed a 42 U.S.C. § 1983 complaint naming respondents the Nevada Department of Corrections (NDOC) and several of its current or former employees, Dr. Dana Marks, C. Mell, and Brian Egerton (collectively respondents). Kisner sought monetary damages and injunctive relief based on his allegations that respondents failed to treat his medical condition. The State of Nevada, appearing as an interested party, moved to dismiss the complaint, arguing Kisner was required to name the State as a defendant to invoke the waiver of sovereign immunity and that he had failed to complete NRCP 4.2's dual service requirement for state agencies and employees. Kisner opposed and attached proof of service indicating he served all respondents, save Mell, by delivering a copy of the summons and complaint to the warden's assistant on September 19, 2023. Kisner further

requested the district court grant him an extension of time to complete service on the Office of the Attorney General (OAG), which would complete the dual service requirement. The State filed a reply that acknowledged Kisner had completed personal service on the respondents but argued he had not served the OAG nor had he demonstrated good cause for an extension of time to do so. The district court subsequently entered an order granting the motion to dismiss and finding that Kisner failed to complete the dual service requirement and further finding that Kisner was required to name the State as a defendant to invoke the waiver of sovereign immunity. Kisner now appeals.¹

On appeal, Kisner argues the district court erred by dismissing his complaint because he cannot name the State as a defendant in § 1983 matters. Kisner further argues that the court improperly dismissed his complaint because he completed personal service on the respondents, save Mell, and should have been provided additional time to complete service on the OAG.

¹NDOC and Egerton suggest this court may not have jurisdiction over this appeal because Kisner did not utilize the institution's notice-of-appeal log when filing his notice of appeal, such that it is unclear whether his appeal is timely. However, the notice of entry of the order dismissing Kisner's complaint was not served by a party in accordance with NRCP 58(e)(1) and thus the 30-day period to file a notice of appeal never began to run. *See In re Duong*, 118 Nev. 920, 922-23, 59 P.3d 1210, 1211-12 (2002) (concluding that the deadline for filing an appeal had not yet begun to run when the notice of appeal was filed because the respondent had failed to serve the appellant with written notice of entry).

We conclude the district court erred to the extent it dismissed the complaint for failing to name the State as a defendant. In their answering brief, NDOC and Egerton² correctly concede the State cannot be named as a defendant in § 1983 actions and thus dismissal on that ground was erroneous. *See Craig v. Donnelly*, 135 Nev. 37, 41, 439 P.3d 413, 416 (Ct. App. 2019) (holding that because states cannot be named in § 1983 claims, plaintiffs do not have to name the State to invoke Nevada's sovereign immunity waiver). However, NDOC and Egerton contend this court should nevertheless affirm the dismissal of the § 1983 claims asserted against them in their official capacity. *See Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

Here, Kisner named the respondents in both their individual and official capacities. NDOC and Egerton correctly argue that a § 1983 action cannot be maintained against current or former state officials sued in their official capacities. *Craig*, 135 Nev. at 40, 439 P.3d at 416. However, such claims may be properly maintained against state officials named in their individual capacities. *Id.* at 41, 439 P.3d at 416. Further, a plaintiff can name a state agency in a § 1983 action so long as he seeks injunctive relief. *N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. System*, 107 Nev. 108, 115, 807 P.2d 728, 733 (1991) (citation omitted). Accordingly,

²The OAG filed an answering brief on behalf of NDOC and Egerton and further filed an amicus brief in support of Marks and Mell, who it has not represented in these proceedings.

we affirm the dismissal of Kisner's § 1983 claims insofar as they were directed at Marks, Mell, and Egerton in their official capacities. However, because Kisner could properly maintain a § 1983 action against those respondents in their individual capacities and against NDOC for injunctive relief, we turn to the question of whether Kisner sufficiently effectuated service of his complaint.

NDOC and Egerton contend that this court should affirm the dismissal of the individual capacity claims because Kisner failed to complete the dual service requirement for serving current or former state officials. We review an order granting a motion to dismiss for failure to effectuate timely service of process for an abuse of discretion. *Abreu v. Gilmer*, 115 Nev. 308, 312-13, 985 P.2d 746, 749 (1999). A plaintiff who names any current or former employee of the state as a defendant "for an act or omission relating to his or her public duties or employment" must serve the complaint on both the employee and the Nevada Attorney General at the Office of the Attorney General in Carson City. NRCP 4.2(d)(2).

A court "must allow a party a reasonable time to cure its failure to serve the Attorney General under Rule 4.2(d)(1) or (2), if the party has served the [state employee]." NRCP 4.2(d)(6)(B). The supreme court recently held a party is not required to file a motion for an extension of time to take advantage of NRCP 4.2(d)(6)(B)'s cure period. *Harris v. State*, 138 Nev. 403, 411, 510 P.3d 802, 810 (2022). In *Harris*, the supreme court held

NRCP 4.2(d)(6) *requires* the district court to allow a plaintiff a reasonable time to cure defects in service, even after the generally applicable 120-day service period under NRCP 4.2(e) expires, if the

party has timely fulfilled at least one of the two service requirements under NRCP 4.2(d)(2) for service on public officers and employees sued over acts or omissions relating to their duties or employment, regardless of whether the plaintiff has filed a motion for an extension of time.

Id. at 412-13, 510 P.3d at 811 (emphasis added).

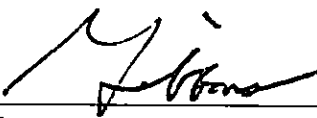
Here, the record demonstrates Kisner served all respondents save Mell by delivering a copy of the summons and complaint to the warden's assistant on September 19, 2023, and as NDOC and Egerton concede on appeal, the warden's assistant was authorized to accept service for NDOC, Egerton, and Marks. Because Kisner completed the personal service requirement as to those three respondents, the district court was required to provide Kisner reasonable time to complete service on the OAG.³ See NRCP 4.2(d)(6) (creating a cure period for the dual service requirement); *Harris*, 138 Nev. at 411, 510 P.3d at 810 (holding district courts are required to provide a plaintiff additional reasonable time to complete the dual service requirement when they have fulfilled at least one of the dual service requirements). However, Kisner acknowledges he did not complete personal service on Mell and thus we conclude he was not entitled to NRCP 4.2(d)(6)'s mandatory cure period as to his claims against Mell. Accordingly, we affirm as to the dismissal of Kisner's § 1983 claim

³We have considered the remaining arguments in the answering brief filed on behalf of NDOC and Egerton and have likewise considered the arguments raised in the amicus brief filed in support of Marks and Mell regarding service and conclude reversal is still required.

against Mell in his individual capacity, but reverse the dismissal of § 1983 claims against NDOC for injunctive relief, and Egerton and Marks in their individual capacity, and we remand for further proceedings consistent with this order. On remand, the district court must provide Kisner reasonable time to complete the dual service requirement.⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Eleventh Judicial District Court Clerk/Court Administrator
Richard Kisner
Attorney General/Carson City
Attorney General/Las Vegas

⁴We deny Kisner's request that we strike NDOC and Egerton's answering brief and the amicus brief filed in support of Mell and Marks.